that Inland, a small carrier with no intrastate rights, could not hope to operate profitably; that McNamara was unable to operate the carrier profitably and was forced to sell because of illness; that McNamara instituted the negotiations which led to the sale of Inland's stock to Gillen; that Central made full disclosure of its interest in encouraging Gillen to purchase the stock of Inland; that Gillen was not bound to sell to Central and had attempted to dispose of the stock to other carriers; that when Gillen was encouraged to buy the stock of Inland they had no intention of providing assistance other than the loan of certain employees who, at all times, were under the control of Gillen; that the additional assistance to Inland was necessary to prevent its complete collapse; that the assistance rendered resulted in no economic advantage to Central; and that a finding that Inland was unlawfully controlled would result in effectively destroying it to the detriment of its creditors and service to the public. They further argue that the Commission has found no control or power to control in similar instances, citing *McLean Trucking Co.—Pur.—Atlanta, C. A., Motor Lines, Inc.*, 60 M.C.C. 475, *Magnolia Exp. Inc.—Purchase—Capital Transport, Inc.*, 54 M.C.C. 519, and *Atlanta Motor Lines, Inc.—Control and Merger*, 70 M.C.C. 448; that the Commission already has recognized the need to preserve Inland's operations by grant of temporary authority; and that the public interest requires a consideration of all matters with a view of preserving Inland's service.

In reply, the Bureau contends that the argument of

respondents that the examiner failed to "report" certain facts, and to consider the true basic facts that existed in the situation, are without merit; that most of the "facts" set forth by the respondents either were considered and discussed by the examiner or have no material bearing on the issues; that respondents do not attack the examiner's findings as being unsupported by the evidence, but argue that he should have reached a different conclusion; and that the acts of the parties and the assistance provided Inland by Central transcends mere encouragements and should be considered unlawful control.

Interveners, in their replies, argue primarily that Inland's rights, being complementary to those of Central, provide access to southwestern Texas and the unlawful control has resulted in a competitive advantage to Central and loss by them of traffic; that the respondents' sole argument is that they were compelled to render the aid and assistance afforded Inland because they had encouraged Gillen to purchase the stock of that carrier; that it is inconceivable that they would have channeled so much money and aid into its operations with no hope of profit; that the issue is not whether Central would benefit economically, but whether it and respondents effectuated control of Inland's operations without approval of the Commission; that the term control does not mean absolute control, but also includes the power to control, citing *Lancaster & New York M. Freight Service, Inc., Conversion*, 83 M.C.C. 511; that whether Inland would be destroyed by an adverse ruling is not material to the issues; and that the record is replete with evidence

showing that unlawful control was effectuated by the parties.

Protestants except to the findings of the examiner in the *Control case* that the application therein should be approved. They argue that the examiner has failed to support his finding that such approval would be consistent with the public interest; that evidence to justify such conclusion is not of record; and that a finding to that effect must be based on evidence presented of record and not on assumptions. Protestants further argue that Inland ceased to function as an interstate carrier in its authorized area when it leased its intrastate rights to Alamo and Southwestern, and they utilized such authority as a basis for the institution of interstate operations under the proviso; that the separation of Inland's intrastate rights from its interstate rights, and creation of two operations in interstate commerce, was found objectionable and a basis for denial of the application in the *Yellow Transit case*;[6] that the evidence is clear that the reversionary interests in the intrastate rights leased to Alamo and Southwestern by Inland is now held by J. H. Robinson, and rejoinder of the interstate and intrastate rights, if Central acquired both Inland and Alamo, could not be for a period longer than the existing lease; and that it would be contrary to established precedent of the Commission to sanction the creation of duplicating operations in interstate commerce through the device of a prior disposition of corre-

[6] *Southern Pacific Transport Co.–Purchase–Inland Motor*, 65 M.C.C. 775, decided June 4, 1956, embracing *Yellow Transit Freight Lines, Inc.–Purchase–Inland Motor*, the Yellow Transit case.

sponding intrastate authority, citing *Navajo Freight Lines, Inc.—Pur.—Strickland Transp. Co.*, 75 M.C.C. 713.

Protestants further argue that in the *Yellow Transit case*, it was found that Inland's interstate rights had been dormant since 1953; that McNamara testified that they were dormant when he acquired control of Inland in 1956; that there is no evidence showing the scope of Inland's operations when Gillen acquired its stock; that the evidence shows Central exercised unlawful control of Inland through Gillen, and any service performed by Inland after Gillen acquired its stock on December 1, 1957, is entitled to no weight; that even if the data of record respecting its operations after that date are considered it would disclose that only a few points were served, and none south of Bishop; that no public witnesses support the application; that Inland, prior to the unlawful control, was not a competitive factor; and that in the absence of any evidence of a public need for additional service, they are entitled to protection from competition by Central.

In respect to the question of Central's fitness, protestants argue that the factual situation is not an issue, but that the sole issue is whether Central's violation of the act properly may be overlooked; that there has been no contention of ignorance or lack of legal knowledge; that while past violations are not an absolute bar to an approval of a transaction under section 5, the Commission consistently has disapproved transactions where, as here, the applicants

have flagrantly flouted the Commission's jurisdiction; and that, contrary to the conclusions of the examiner, grants of temporary authority under section 210a(b) are based on different criteria, create no presumption as to the action that should be taken on the section-5 application, and certainly do not render moot the question of unlawful control or unfitness of Central.

In reply, Central argues that Gillen revitalized the operations of Inland pursuant to Commission instruction, thereby refuting any inference of dormancy; that there is no basis for concluding that it would provide any new or unauthorized service to the public; that the evidence does not support a finding that protestants would be materially affected by approval in the *Control case*, and they have advanced nothing new which was not considered by the Commission when it granted the temporary control authority to Central; that the temporary control saved Inland's operations, reassured its creditors and employees, and benefitted the public through continuance of its service; and that Central has demonstrated its ability to restore financial stability and improve Inland's service, and the findings of the examiner should be upheld.

The principal question presented for determination in the *Investigation case* is whether the control of management of Central in a common interest with Inland was effected without prior approval of this Commission at the time Gillen acquired the stock of Inland and continued until the grant of the temporary control authority to Central in the *Control case* on September 5, 1961. In respect to the grant of temporary control authority, it may not properly be con-

strued as indicating that the Commission either condoned or sanctioned any unlawful acts of the respondents. On the other hand, it is clear that the grant of temporary authority effectively terminated any unlawful control that may have existed. See *Ashworth Transfer, Inc.—Hawkes Transp Co.*, 87 M.C.C. 653.

Whether common control has existed in a particular situation is one of fact and must be determined by the special circumstances in each case. *Rochester Tel. Corp. v. U.S.*, 307 U.S. 125. The management of one carrier in a common interest with another, even though unlawful, does not necessarily imply harm or detriment. See *Masten Transp., Inc. — Merger*, 70 M.C.C. 421.

In *Stacks-Investigation of Control*, 75 M.C.C. 625, the Commission, division 4, stated on page 636 thereof as follows:

> Paragraphs (4), (5), and (6) of section 5 of the act enumerate various illustrative transactions, creating a conclusive presumption of the accomplishment of the control or management in a common interest of two or more carriers, by reason of affiliation. Under paragraph (6), affiliation exists if it is "reasonable to believe" that the affairs of one carrier will be managed in the interest of another. It is not necessary that the carrier of which control would be acquired would be managed solely or exclusively in the interest of the carrier with which the person is affiliated. *Greyhound Corp.—Investigation of Control — Southern, Ltd.*, 45 M.C.C. 59, 77, and *Southwestern, Greyhound Lines, Inc.—Merger*, 39 M.C.C. 243. Once such affiliation has been

established, the conclusive presumption of paragraph (5) that control or management in a common interest has been accomplished or effectuated applies. As has been stated, section 5(4) contains broad provisions prohibiting the control or management of one carrier in a common interest with another, without our prior approval, however, such result is obtained. *United States v. Marshall Transport Co.*, 322 U.S. 31.

In the subject proceedings, both examiners, in their separate reports, have concluded that the evidence establishes that Central unlawfully acquired control of Inland on December 1, 1957, when Gillen took over its operations. In our opinion, such conclusion of the examiners is well supported by the evidence. It is clear that Gillen was without motor carrier experience when he acquired the stock of Inland, and that, except for solicitation and collection of accounts, he was dependent upon the employees of Central for the conduct of Inland's operations. The $36,400 loan from Central through Linam for the use of Inland, the accumulation of an indebtedness in excess of $84,000 resulting from services performed by Central for Inland, with no real effort by Central to collect such indebtedness or curtail its services, the arrangement of Inland's financing through *assurances* by Central to the banks, the understanding between Gillen and respondents that he would be able to recoup his investments, plus 6 percent, as soon as the *Alamo case* was approved, and the willingness of Central and its officers to invest in the continuation of Inland's service, support the conclusion that Central, Callan, and Linam were, at the time Gillen purchased the stock on December 1,

1957, affiliated with each other within the meaning of section 5(6) of the act; that the control or management of Inland, or the power to control or manage such carrier, in a common interest with Central did exist and continued until terminated by the grant of temporary control authority on September 5, 1961; and that Callan, Linam and Gillen participated in the effectuation and continuance of such unlawful control.

Considering that Central is an aggressive, well managed motor carrier and has engaged in motor carrier operations for a number of years; that its officers are experienced and well familiar with motor carrier proceedings and the rules and requirements of the act; and that Central and its officers have been represented by competent counsel, it is clear that a finding could not be justified that the action of the parties in effecting unlawful control and management of Inland in a common interest with Central was not willful. The arguments of respondents that the financial and other assistance afforded Inland should be regarded only as encouragement; that such involvement was necessary to protect Inland's operations; that they had no intention of involving Central in Inland's affairs to the extent shown; that they openly and admittedly encouraged Gillen to purchase the stock of Inland, and openly and fully disclosed to representatives of the Commission the interest of Central in Gillen's purchase of the stock of Inland; that failure to make a more serious effort to collect the indebtedness of Inland to Central was because of the futility thereof; that Central could not possibly gain any

economic advantage from the control of Inland; and that the unexpected delay in obtaining a final disposition of the *Alamo case* was the sole cause of the situation, are not sufficient to relieve respondents of their unlawful action. On the other hand, such factors, when considered in connection with Inland's insolvency, and its lack of adequate facilities, personnel and management to conduct efficient motor carrier operations, support the finding that the violations were not in such disregard of the act as to warrant a conclusion that Central is unfit to acquire control of Inland. We do not believe that the violations were so severe as to bar approval of the application in the *Control case* if it is otherwise found to be consistent with the public interest. See *Atlas Van Lines, Inc. — Control and Merger*, 75 M.C.C. 175, *Masten Transp., Inc.— Merger*, 70 M.C.C. 421, *Takin Bros. Frt. Line, Inc.— Control—Iowa-Nebr. Transp.*, 75 M.C.C. 236, and *Baggett—Control—Walker Hauling Co.*, 65 M.C.C. 522.

As previously indicated, the operations of Inland have not been profitable. Part of its difficulties have been due to the fact that its previously-held intrastate rights, corresponding to its interstate authority, are under long-term leases to Alamo and Southwestern. Central does have an application pending to acquire control of Alamo and has asserted that it proposes to merge Alamo and Inland if successful in acquiring both carriers. It also has indicated that one of the purposes of the transaction in the *Control case* is the reunification of the interstate rights of Inland with that portion of the corresponding intrastate rights

leased to Alamo. However, there is no present assurance that Central will ultimately succeed in acquiring Alamo. Moreover, the evidence is clear that the reversionary interest in the intrastate rights lease to Alamo is no longer in Inland but in J. H. Robinson. What disposition the latter may propose of the intrastate rights upon expiration of the existing leases and what effect revision of section 206(a) of the act may have upon the proviso operations cannot be determined in these proceedings. In any event, there is no showing that any permanent unification of the intrastate rights leased to Alamo and the interstate rights of Inland would be accomplished by approval of the application in the *Control case*. In the absence of such a showing, the transaction in the *Control case* does not meet the objection to a prior proposal to transfer Inland's interstate rights set forth in the *Yellow Transit case*, at page 779, as follows:

> The Commission has declined to approve various transactions where severance of interstate and corresponding intrastate operating rights, theretofore operated by a single carrier, might result or had resulted in the creation of 2 rights, in place of 1, to operate in interstate or foreign commerce over the same highways and between the same points; and it has declined to sanction the use of various devices in attempting to create 2 rights in place of 1. See *Courier Exp., Inc.—Purchase—Huber Motor Transp. Co.*, 45 M.C.C. 688, and cases cited therein, in some of which the severance and creation of the second right was being proposed and in others it had been accomplished. Applicant's argument that Alamo and S.M.T. leased the intrastate rights and instituted

proviso operations, knowing full well that Inland intended to transfer the interstate certificated rights, does not alter the situation and does not lessen the impact an approval and consummation of the purchase by Yellow Transit would have upon competition in the area. Inland itself owed a duty in seeing that the intrastate rights were not used as a basis for proviso operations, if it intended to dispose of the interstate certificated rights to another carrier. Following prior cases, we are of the opinion and find that only 1 interstate operating right may properly emerge from the single operation conducted by Inland, and that the procedure used by the parties in attempting to create 2 interstate operations may not be sanctioned in the public interest.

As to the service performed by Inland under its rights, applicants have submitted abstracts of shipments handled by Inland in 1958, 1959, 1960, and the period January 5, through October 21, 1961, and for the month of April 1961. No evidence was presented showing the actual scope of the service rendered by Inland at the time Gillen acquired its stock in December 1957, and, as a rule, we have accorded little weight to shipments handled by a carrier where the evidence shows it has been unlawfully controlled in a common interest with another carrier. However, we believe the scope of Inland's service at or about the time Gillen acquired the stock of such carrier can be determined by an analysis of the shipments transported in January 1958. During this month, Inland transported 488 shipments of various commodities, of which 8 originated at 5 points served by Inland and 480 were interline shipments received by Inland at

an unnamed interline point and transported to 23 destinations served by it, including Harlingen served on 147 shipments, Brownsville on 98 shipments, and McAllen on 72 shipments, with more than 20 shipments moving to Westlaco, Pharr, Mission, and Edinburg, 17 to San Benito, 10 to Donna, and less than 10 shipments each to 14 points. Some 6 shipments were interlined by Inland for movement beyond.

As to the service performed by Inland prior to the grant of temporary authority on September 5, 1961, the abstract of shipments handled in 1960 shows that some 700 shipments were transported, of which 499 (71 percent) of various commodities originated at San Antonio, 105 shipments of carbon black originated at Aransas Pass—Kosmos, and 62 shipments of chemicals originated at Bishop—Chemcel. Some 30 shipments were received by Inland at unnamed interline points. About 560 shipments (80 percent) were interlined by Inland with other motor carriers at unnamed points for movement beyond its lines, 110 shipments moved to Houston, and 29 shipments moved to various destinations in Texas. In the period January 5 through October 21, 1961, Inland transported 975 shipments, of which 277 moved after September 5, 1961. Of the total shipments 768 (80 percent) of various commodities originated at San Antonio, 62 shipments of carbon black originated at Aransas Pass —Kosmos, 27 shipments of chemicals originated at Bishop—Chemcel, and 116 shipments of various commodities involved interline traffic received by Inland at unnamed points. Of 10 destination points served prior to September 5, 1961, Houston was served on 57

shipments, Harlingen on 2 shipments, Alice on 3 shipments and 5 points were served on one shipment each. The remainder of the shipments were interlined by Inland at unnamed points for movement beyond its lines. The exhibit listing shipments transported in April 1961, shows that some 790 shipments were transported, of which 674 shipments (86 percent) involved interline traffic received by Inland at unnamed points, 84 shipments originated at San Antonio, and 32 shipments originated at Corpus Christi, Kosmos, Chemcel, and Houston. Corpus Christi was served on 618 shipments (80 percent), Victoria on 62 shipments terlined by Inland primarily at Houston for movement Houston on 15 shipments and 95 shipments were inbeyond its lines.

From the above, it is evident that the service performed by Inland in January 1958, and in 1960 and the indicated periods in 1961, has been limited to some extent as to origins and destinations served. However, we believe a finding is warranted that the carrier generally has operated commensurate with its resources and facilities, that the factual situation has changed since the decision in the *Yellow Transit case*, and that its operating rights, generally, cannot now be found to be dormant. We also do not believe a finding is warranted that the operations of Inland were influenced to any great extent by Central or persons affiliated therewith, considering the service performed in 1958 and 1961, even though it is clear that the power to control the operations of Inland did vest in Central and persons affiliated with such carrier.

Whether some modification of the operating author-

ity of Inland would be in order on the basis that certain portions are dormant need not be determined. It is clear that approval of the application in the *Control case* would not meet the objection set forth in the *Yellow Transit case* to a transfer of Inland's interstate rights. On the present record, therefore, the application cannot be found to be consistent with the public interest. As Central is now in temporary control of Inland through management, our conclusion to deny the application in the *Control case* will necessitate termination of such temporary control authority. In addition, as termination of the temporary control authority would reinstate he unlawful common control found to have existed prior to September 5, 1961, respondents who are found to have participated in the continuance of the unlawful control, will be expected to take such steps as may be necessary to dispose of all their interest, direct or indirect, in Inland or in any of its stock, effective with termination of the temporary control authority, and to advise this Commission of the steps they have taken.

In No. MC-F-7682, we find that the control and management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., was effected in violation of section 5(4) of the act, and that the said violation continued until September 5, 1961, when it was terminated by the grant of the temporary control authority in No. MC-F-7882; that respondents, W. W. Callan, R. H. Linam, Blake Gillen, and the carriers named immediately above, participated in the effectuation of the said control and management, and in its continuance.

In No. MC-F-7882, we find that the transaction has not been shown to be consistent with the public interest, and that the application, accordingly, should be denied.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 11th day of January, A. D. 1963.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Investigation of the matters and things involved in these proceedings having been made, said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report and the separate reports of the examiners in said proceedings, are hereby made a part hereof:

It is ordered, In No. MC-F-7682, That, effective with termination of temporary authority granted in No. MC-F-7882, respondents Central Freight Lines, Inc., of Waco, Tex., W. W. Callan, and R. H. Linam,

also of Waco, and Blake Gillen, of Corpus Christi, Tex., be, and they are hereby, required to divest themselves of any and all interest, direct, or indirect, which they now have in the capital stock of Inland Motor Freight Lines, Inc., also of Corpus Christi; *provided, however*, that in such divestiture, none of said shares of capital stock shall be sold or transferred, directly or indirectly, to any agent of, or any one otherwise directly or indirectly affiliated or connected with, or under the control of W. W. Callan, or of any corporation which he is financially interested or affiliated with, or to any stockholder, officer, director, employee, or agent of any such corporation or affiliated company or companies.

It is further ordered, That, prior to termination of the said temporary authority, the said respondents shall report to the Commission, in writing, under oath, the action taken by each of them to comply with the terms of this order and the terms under which such compliance is to be affected.

It is further ordered, That the application in No. MC-F-7882 be, and it is hereby, denied.

It is further ordered, That this order shall be effective 60 days from the date it is served.

And it is further ordered, That temporary authority granted in No. MC-F-7882 on September 5, 1961, as extended by order of February 16, 1962, be, and it is hereby, terminated on said effective date.

By the Commission, division 3.

HAROLD D. McCOY,
Secretary.

SERVICE DATE
JULY 30, 1963

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 23d day of July, A. D. 1963.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL INLAND MOTOR FREIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC

Upon consideration of the record in the above-entitled proceedings, the petition of Central Freight Lines, Inc., W. C. Callan, R. H. Linam, Inland Motor Freight Lines, Inc., and Blake Gillen, filed March 18, 1963, for reconsideration of the report and order of the Commission, Division 3, decided January 11, 1963, and the replies thereto filed by protestants and interveners; and

It appearing, That the conclusions in the said report with respect to No. MC-F-7882 are based on adequate findings supported by the record, and that there has been presented no error of fact or law with respect to the findings and conclusions therein which warrant reconsideration:

It is ordered, That No. MC-F-7682 be, and it is hereby, reopened for reconsideration on the present record.

It is further ordered, That the said petition be, and it is hereby, denied, in all other respects.

And it is further ordered, That the effective date of the order of January 11, 1963, in No. MC-F-7882, be, and it is hereby, postponed pending further order therein.

By the Commission, Division 3, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary.

[SEAL]

MF-2809

INTERSTATE COMMERCE COMMISSION

No. MC-F-7882[1]

CENTRAL FREIGHT LINES, INC.–CONTROL–INLAND MOTOR FREIGHT LINES, INC.

Decided November 15, 1963

On reconsideration, findings in the prior report, 90 M.C.C. 777, modified.

Additional appearances:

John S. Fessenden and *Roland Rice* for applicants and respondents.

Ellis V. Gregory for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Van Thompson, Jr., for protestant.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS TUGGLE, MURPHY, AND TUCKER

MURPHY, *Commissioner:*

In the prior report, 90 M.C.C. 777, decided January 11, 1963, the Commission, division 3, found, in No. MC-F-7682, that the control and management of Inland Motor Freight Lines, Inc., of Corpus Christi, Tex., in a common interest with Central Freight Lines, Inc., of Waco, Tex., hereinafter called Inland and Central, respectively, had been effectuated in violation of section 5(4) of the Interstate Commerce Act, that the said violation had continued until September 5, 1961, when it was terminated by the grant of temporary control authority in No. MC-F-7882, and that the named respondents, Inland, Central, W. W. Callan, principal stockholder and chairman of Central's board of directors (Callan), R. H. Linam, president of Central (Linam), and Blake Gillen, principal stockholder of Inland (Gillen), had participated in the effectuation of such unlawful control and management, and in its continuance. In No. MC-F-7882, it was found that the section 5 transaction, whereby Central proposed to acquire control

[1] This report also embraces No. MC-F-7682, Central Freight Lines, Inc.–Investigation of Control–Inland Motor Freight Lines, Inc.

of Inland through purchase of its outstanding capital stock from Gillen, would not be consistent with the public interest. An order was entered denying the application in No. MC-F-7882, and directing that the named corporate and individual respondents in No. MC-F-7682, except Inland, divest themselves of any and all interest, direct, or indirect, that they have in the capital stock of Inland.

A petition was filed March 18, 1963, whereby respondents sought reconsideration of the above order, approval of the control of Inland by Central in No. MC-F-7882, hereinafter called the control application, and stay of the order, including that portion of the order terminating temporary authority granted on September 5, 1961, as extended by order of February 16, 1962. Replies were filed by the Bureau of Inquiry and Compliance (the Bureau) and by protestants and interveners, Brown Express, Inc., Red Arrow Freight Lines, Inc., Southwestern Motor Transport, Inc., and Alamo Express, Inc.

By order of July 23, 1963, we reopened the proceeding in No. MC-F-7682, hereinafter called the investigation proceeding, for reconsideration on the present record, postponed the effective date of the order of January 11, 1963, pending further order of the Commission, and denied the petition in all other respects.

Our reopening of the investigation proceeding for reconsideration was solely for the purpose of taking into consideration the decision of the United States Supreme Court in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, decided December 3, 1962, hereinafter called the *Gilbertville* case, and our further discussion herein will, therefore, be concerned solely with the question whether, in light of the Court's decision in the *Gilbertville* case, and in order to assure that the section 5(4) violation is terminated, it is appropriate to require Gillen to dispose of his stock interest in Inland, or whether some other less drastic requirement may be imposed. The facts are adequately set forth in the prior report and will not be repeated herein except to the extent necessary for clarity of discussion.

Respondents in their petition rely on the Court's decision in the *Gilbertville* case as support for the contention that the divestiture by Gillen of Inland's stock, in the instant proceeding, is an inappropriate remedy. In this connection, they argue that such divestiture by Gillen would work on him a drastic hardship, and could result in bankruptcy, with irreparable loss to himself and to numerous creditors, including Central. They further argue

that, for the same reasons, to require Central to divest is to visit punishment upon that carrier without corresponding benefit to the public, and they point out that in the *Gilbertville* case, the Court noted that "the Commission's power is corrective, not punitive." They contend that the *Gilbertville* case seems clearly to say that divestiture by Gillen should not be required.

In reply, the Bureau contends that respondents have been afforded full hearing in the investigation proceeding on the issue of a violation of section 5(4); that after exhaustive arguments of the facts and law by respondents and the Bureau, the Commission discussed its findings of fact and conclusions of law with specificity; that the order requiring divestiture represents the considered opinion of the Commission based on those findings; that the Commission has functioned within the concept expressed by the Supreme Court in the *Gilbertville* case; and that, based on its findings that the violation stems from Gillen's affiliation with the other respondents, the Commission has properly ordered Gillen to divest himself of his interest in Inland.

The Bureau further argues that the fact that respondents may be hurt by the order requiring termination of the violation is no defense, otherwise carriers could evade the law by presenting the Commission with a *fait accompli*, and that, furthermore, the argument that Gillen would be forced into bankruptcy is unsupported by the evidence and is speculative since the record shows that Gillen, before investing his funds, was guaranteed his full investment, plus 6 percent interest. The Bureau concludes that requiring respondents to divest themselves of all interests in Inland is not only appropriate but is necessary to assure the cessation of the violation.

The remaining interveners and protestants subscribe, generally, to views similar to those adopted by the Bureau, and most point out that other than discontinuing the investigation proceeding and approving the control application, the respondents have suggested no alternative to divestiture as a means of terminating the violation.

Recapitulating some of the facts in these proceedings, Gillen acquired the capital stock of Inland from James S. McNamara, now vice president of protestant Alamo, who had previously acquired the stock from J. H. Robinson, now deceased. Robinson, while in control of Inland, had caused that carrier to grant long-term leases of Inland's intrastate Texas operating authority to Alamo and Southwestern, and thereafter personally acquired,

pursuant to an order of the Railroad Commission of Texas, the reversionary interest in the operating rights, subject of the leases. Southwestern and Alamo are utilizing the said leased intrastate rights for performance of interstate operations, under the "grandfather" clause of section 206(a)(7) of the act, which correspond substantially to the operations authorized to be performed by Inland under its interstate certificate. For reasons fully set forth in the prior report and which need not be repeated here, the above-described separation of intrastate rights from interstate rights formed the basis for denial of the *control* application in the prior report. As indicated, the petition herein, to the extent it seeks reconsideration of the latter action, has been denied.

The finding in the prior report that Central unlawfully acquired control of Inland when Gillen acquired control of Inland was predicated on the fact that the purchase of Inland's stock by Gillen was consummated with the aid of Callan and Linam, and that subsequent to the date of purchase and prior to the grant of temporary authority in connection with the control application the operations of Central and Inland were conducted in a manner which left no doubt that the two carriers were unlawfully controlled and managed in a common interest. The finding that common control and management had been effectuated is not contested by respondents in their pleading here being considered.

While it was concluded in the prior report that certain factors advanced by respondents as negating the existence of a law violation did not, in fact, do so, and did not justify a finding that the action of the parties in effecting unlawful control and management of Inland in a common interest with Central was not willful, it was further found that those factors, when considered in connection with Inland's insolvency and its lack of adequate facilities, personnel, and management to conduct efficient motor carrier operations, supported a finding that the violations were not in such disregard of the act as to warrant a conclusion that Central is unfit to acquire control of Inland, and the belief was expressed that the violations were not so severe as to bar approval of the control application if it could otherwise be found to be consistent with the public interest. As has been shown, the latter finding could not be made because of other considerations.

With respect to the Commission's power to require termination of violations of the nature discussed above, the Supreme Court, in the *Gilbertville* case, apointed out that there is little

question that divestiture is within the scope thereof. However, the Court further stated:

> as § 5(7) itself implies, the Commission's power is corrective, not punitive. The justification for the remedy is the removal of the violation. * * * * * * * * Our duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of private parties or the general public.

In remanding that case for further proceedings and having reference to our choosing the proper remedy, the Court referred to certain "mitigating considerations," as follows:

> we are faced with evidence that the statutory violation occured not just from Kenneth Nelson's act of acquiring Gilbertville, but from the acquisition plus subsequent practices integrating the management and operations of Nelson and Gilbertville, *practices that could conceivably be discontinued without divestiture*. [Emphasis added.]

As previously pointed out, denial of the control application in the prior report was based on considerations other than the law violation which, similarly to that in the *Gilbertville* case, stemmed not alone from Gillen's action in acquiring Inland's stock, but from that action and Inland's subsequent dependency upon Central for financial and operational assistance, a dependency that could conceivably be eliminated, leaving Inland free to be operated independently of Central and persons in control of or affiliated with Central. Respondents have not, to date, suggested any alternative to divestiture which would, in the fact of denial of the *control* application, terminate the law violation.

We conclude that the named respondents should be free to employ any lawful means to prevent any further violation upon termination of the temporary authority in No. MC-F-7882, rather than be limited exclusively to divestiture, and our order will require them to cease and desist from further violation and to report promptly the steps taken by them in compliance with said order.

We find that the findings in the prior report, upon further consideration, should be modified in accordance with the discussion herein.

An appropriate order will be entered.

(A-43)

SERVICE DATE
July 2, 1964

INTERSTATE COMMERCE COMMISSION

No. MC-F-7882[1]

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Decided June 29, 1964

Upon reconsideration:

(1) In No. MC-F-7882, acquisition by Central Freight Lines, Inc., of control of Inland Motor Freight Lines, Inc., through purchase of capital stock, and, in turn by W. W. Callan, through the transaction, approved and authorized, subject to condition.

(2) In No. MC-F-7682, upon investigation, control or management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., found to have been effectuated in violation of section 5(4) of the Interstate Commerce Act, but that such violation terminated September 5, 1961. Investigation discontinued. Prior reports 90 M.C.C. 777 and 93 M.C.C. 411.

Appearances as shown in the prior reports.

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[1]This report also embraces No. MC-F-7682, Central Freight Lines, Inc. —Investigation of Control—Inland Motor Freight Lines, Inc.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 3, ACTING AS AN APPELATE DIVISION, COMMISSIONERS TUGGLE, HUTCHINSON AND MURPHY

MURPHY, *Commissioner:*

In the prior report on reconsideration, herein called the *second prior report* 93 M.C.C. 411, decided November 15, 1963, the Commission, Division 3, acting as an Appellate Division, modified the findings in the report of the Commission, Division 3, herein called the *first prior report*, 90 M.C.C. 777,[2] decided January 11, 1963, to allow the respondents in No. MC-F-7682, herein called the *investigation* case, to employ any lawful means of preventing further violation upon termination of the temporary authority in No. MC-F-7882, herein called the *control* case, rather than to require divestiture of the unlawful control. On January 14, 1964, applicants-respondents filed a petition for waiver of rule 1.101(e) of the General Rules

[2]The report in 90 M.C.C. 777 found (1) that the control and management of Inland Motor Freight Lines, Inc., herein called Inland, in a common interest with Central Freight Lines, Inc., herein called Central, had been effectuated in violation of section 5(4) of the act, that said violation had continued until September 5, 1961, when it was terminated by the grant of temporary control authority, and that respondents Inland, Central, and W. W. Callan, R. H. Linam, and Blake Gillen, herein called Callan, Linam and Gillen had participated in the effectuation of such unlawful control and management and in its continuance, and (2) that the section 5 transaction would not be consistent with the public interest. An order was entered denying the application in the *control* case, and directing that the named corporate and individual respondents, in the *investigation* case, except Inland, divest themselves of any and all interest, direct or indirect, that they have in the capital stock of Inland.

of Practice, which included a petition for extraordinary relief, for reconsideration, for continuance of temporary authority and for approval of the transaction in the *control* case. Replies to the petition have been filed by Alamo Express, Inc., Red Arrow Freight Lines, Inc., and Brown Express, Inc. A motion to strike, or in the alternative, to deny the petition, has been filed by Southwestern Motor Transports, Inc. In view of the action herein, the latter pleading will be considered as a reply to the petition.

Upon reconsideration of the record of the petition of applicants-respondents, and of the replies of protestants, for reasons hereinafter discussed, the provisions of rule 1.101(e) of the General Rules of Practice are waived, the petition of applicants-respondents for reopening and reconsideration, dated January 14, 1964, is accepted for filing and the proceedings are reopened for reconsideration on the present record. The order of November 15, 1963, which accompanied the *second prior report*, has been stayed. The facts are adequately set forth in the *first* and *second prior reports* and will not be repeated herein except to the extent necessary for clarity of discussion.

In substance, it was found in the *second prior report*, following the decision of the United States Supreme Court in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, decided December 31, 1962, that certain practices integrating the management and operation of Central and Inland could conceivably be eliminated, leaving Inland free to be operated independently of Central and persons in control of or

affiliated with Central, and that respondents should be free to employ any lawful means to prevent any further violation, upon termination of the temporary authority in the *control* case, rather than be limited exclusively to divestiture. In the *first prior report*, it was concluded that the action of the parties in effecting unlawful control or management of Inland in a common interest with Central was not in such disregard of the act as to warrant a conclusion that Central is unfit to acquire control of Inland, not so severe as to bar approval of the *control* case if it could otherwise be found to be consistent with the public interest; and that such finding could not be made since the severance of Inland's interstate and corresponding intrastate operating rights had resulted in the creation of two rights, in place of one, to operate in interstate or foreign commerce.

Recapitulating some of the facts in these proceedings, Gillen acquired the capital stock of Inland from James S. McNamara, who had in turn acquired the stock from J. H. Robinson, now deceased. Robinson, while in control of Inland, had caused the grant of long-term leases of Inland's intrastate Texas operating authority to Alamo and Southwestern, and thereafter personally acquired, pursuant to an order of the Railroad Commission of Texas, the reversionary interest in the operating rights, subject to the leases. Such reversionary interest now belongs to Robinson's estate. Southwestern and Alamo are utilizing the said leased intrastate rights for performance of interstate operations, under the "grandfather" clause of section 206(a)(7) of the act. For reasons set forth in the

first and *second prior reports*, the above described separation of intrastate rights from interstate rights formed the basis for denial of the *control* application.

In the instant petition, applicants-respondents contend that at the time of the *second prior report*, the status of Central's purchase of Alamo[3] was in doubt due to litigation in the Federal Courts and the Texas State Courts; that the Federal Court litigation has been resolved in favor of Central, so that Commission approval of the transaction is now unchallenged; that in June 1963, the State Court awarded Central specific performance of its contract for the purchase of the stock of Alamo; that Hart (a selling stockholder of Alamo) was ordered to close with Central on 47.4 percent of the stock of Alamo, which has been done, and directed Mrs. J. L. Walker to exchange the remainder of Alamo's stock with Central upon the initial payment thereon being made; that Central has deposited the initial payment with the Court; that the said Mrs. J. L. Vernie Walker has appealed the state court decision; that a decision of the appellate court is expected before the court's summer recess; and that should an appeal be taken to the Supreme Court of Texas, it is anticipated that a final decision from that court will be issued in 1964.

They further contend that there is no market for the interests of Gillen and Callan in Inland; that efforts to dispose of such interests have been unavail-

[3]By report and order on further hearing, 75 M.C.C. 731, decided January 22, 1959, as modified by order of June 4, 1959, and as affirmed and clarified by supplemental report and order on further hearing, 90 M.C.C. 96, decided February 19, 1962, the Commission conditionally approved the acquisition by Central of control of Alamo.

ing; that Central is negotiating with Mrs. J. H. Robinson for purchase of the reversionary interest in Inland's intrastate rights; and that if such negotiations are successful and Central is authorized to control Inland, a reunification of the latter's intrastate and interstate rights would be made possible. They further contend that Central is willing to have approval of its acquisition of control of Inland conditioned upon the elimination of any duplication between the rights in any Inland-owned certificates and intrastate rights now leased to Southwestern and upon reunification, for at least the term of the current lease, of Inland's interstate rights with the intrastate rights now leased to Alamo, as well as any duplication between Central's rights and those of Inland.

They further contend that the factual circumstances in the *control* case here under consideration are significantly different from those present in *Yellow Transit Freight Lines, Inc.—Purchase (Portion) —Inland Motor Freight Lines, Inc. (Frank Brackney, receiver)*, 65 M.C.C. 775, herein called the *Yellow Transit* case; that it was in error for Division 3 to deny the instant application on the ground of the *Yellow Transit* case; that where the sole ground for denial of a transaction is an erroneous one, simple justice requires that reconsideration be granted; that reconsideration by the entire Commission is warranted so that a fair result can be achieved and a decision issued which will clarify the obvious limitations on the split-off doctrine. Applicants-respondents further contend that the separation of Inland's rights was accomplished many years ago by strangers to the

instant agreement; that in *Courier Exp., Inc.—Purchase—Huber Motor Transp. Co.*, herein called the *Courier case*, 45 M.C.C. 688, relied on by Division 3 in denying the instant application, the person or parties responsible for accomplishing the separation of intratstate rights from interstate rights was one of the parties to the transaction proposed for Commission approval; that none of the applicants-respondents had any connection with the separation of Inland's rights; that the instant transaction is more like the situation present in *Shein's Exp. — Purchase — Leo Smith Forwarding Co., Inc.*, herein called the *Shein's* case, 80 M.C.C. 511, where the parties responsible for a separation of operating rights were not parties to the transaction presented for approval; that in the *Shein's* case, the Commission stated "the situation here is distinguishable from the *Courier* case and other cases cited by protestants wherein the offending carriers were parties to the proceeding involved"; that a separation of operating rights accomplished by parties not here before the Commission is no ground for denying the transaction, especially where the transaction has otherwise been found to be consistent with the public interest; that approval of the instant transaction offers the only real possibility of curing the ancient split of rights, since Central, upon completing the purchase of Alamo will ultimately bring together the interstate operating rights of Inland and its intrastate rights leased to Alamo; that Central is willing to eliminate all duplication between the Inland-owned certificates and its former intrastate rights; and that thereupon the situation upon which the Com-

mission predicated its split-off doctrine will be eliminated.

Protestants contend, generally, that the contentions and arguments of applicants-respondents are substantially the same as presented in their previous pleadings; that applicants-respondents have presented nothing new or extraordinary with respect to the findings and conclusions of Division 3, which would warrant reconsideration of the proceedings; and that the petition for reconsideration being one by the same parties upon substantially the same grounds as previous petitions filed by applicants-respondents is successive and should be rejected.

The finding in the *first* and *second prior reports* that the common control and management of Central and Inland had been effectuated is not contested by applicants-respondents in their pleading here considered and will not be further discussed.

After a careful review of the evidence of record, we have reopened these proceedings primarily due to the fact that in reaching our prior decisions herein, no consideration was given to *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc., supra.* In that case, as here, the separation of intrastate from interstate rights resulted in the creation of two interstate rights where previously only one existed. It was established that none of the parties before the Commission in the *Shein's* case were responsible for the creation of the two rights. In the instant proceedings, the action of Inland in leasing its intrastate operating rights to Alamo and Southwestern was dictated by Robinson,

who long since severed his connection with Inland. No representative of Robinson's estate, nor Alamo or Southwestern are here before the Commission as applicants and approval of the *control* case will not result in any benefit to any of them. In the absence of evidence to the contrary, or of any misconduct by Alamo or Southwestern, or their stockholders, the Commission has no authority to require them to discontinue operations under the proviso. *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc., supra.* The evidence here does not establish that either those persons who controlled Inland both prior to and following the sale of its stock to Gillen, or Central, conspired with Robinson to effect a separation of Inland's intrastate from its interstate operating rights. In the *Shein's* case, Division 4 stated at page 517:

> Applicants herein are not to be penalized because the action of Smithsons and members of the Smith family in disposing of Ontario has resulted in the creation of two interstate operations where before there was only one. The situation here is distinguishable from the *Courier* case and other cases cited by protestants wherein the offending carriers were parties to the proceeding involved.

We, therefore, do not believe the objection raised in the *Yellow Transit* case was appropriately invoked in the instant matter, but rather that the *Shein's* case is dispositive of the *control* case here under consideration.[4] Moreover, approval of the control case is a step

[4]The *Yellow Transit* case makes no mention of individual responsibility, but that application was not denied solely because of the split-off as was the instant transaction. Also, even though Inland may be technically an "offending" carrier party to this proceeding, we do not think

in the direction of a possible permanent reunification of a significant part of the severed rights of Inland, and would thus be an improvement over the status quo.

In the *Shein's* case, no operating rights of either party to the transaction there were cancelled merely because of the creation of two interstate operating rights as a result of the separation of intrastate from interstate rights. Neither will our approval of the *control* case herein be conditioned upon the cancellation of any duplicate operating rights which have been created as a result of the separation of Inland's intrastate from its interstate rights, nor under the test of substantiality do we see any basis for a finding of dormancy in respect of portions of the rights of Inland.

Inland's interstate rights connect with those of Central at Austin, San Antonio, and Houston, and duplicate those of Central between Austin and San Antonio. Following our practice of not approving transactions which would result in the creation, preservation or extension of duplicating operations by separate motor carriers under common control, except in unusual circumstances not present here, our approval herein will be conditioned to require the can-

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that the fiction of separate corporate identity should be carried to the extreme of forever labeling Inland as an "offending" carrier. In fact, Inland under the control of Gillen or Central is no more responsible for the split-off than were applicants in the Shein's case responsible for the split-off therein considered. Moreover, the repeal of the former second proviso of section 206(a)(1) of the act and the new provisions of sections 206(a)(6) and (7) effective October 15, 1962, were not considered in the *first* and *second prior reports*. Under the new provisions of the act the opportunities for split-offs of the nature here involved have been materially reduced if not totally eliminated.

cellation of Inland's authority between San Antonio and Austin.

Upon reconsideration:

We find, in No. MC-F-7882, that acquisition by Central Freight Lines, Inc., of control of Inland Motor Freight Lines, Inc., through purchase of capital stock, and the acquisition by W. W. Callan of control of the latter, through the transaction, upon the terms and conditions set forth herein and in the reports in 90 M.C.C. 777 and 93 M.C.C. 411, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; *provided, however*, that if the authority granted in No. MC-F-7882 is exercised, that concurrently therewith, the operating rights of Inland Motor Freight Lines, Inc., granted in No. MC-4943, authorizing the transportation of general commodities, with exceptions, over a regular route, between San Antonio and Austin, Tex., serving all intermediate points and the off-route point of Redwood, Tex., shall be cancelled.

We further find, in No. MC-F-7682, that the control and management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., was effectuated in violation of section 5(4) of the act, and that the said violation continued until September 5, 1961, when it was terminated by the grant of temporary control authority in No. MC-F-7882; and that the investigation should be discontinued upon exercise of the authority granted in No. MC-F-7882.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 29th day of June, A. D. 1964.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FRIEIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Further investigation of the matters and things involved in these proceedings having been made, and the said Division, acting as an Appellate Division, on the date hereof, having made and filed a further report on reconsideration containing its findings of fact and conclusions thereon, which report and the prior reports in 90 M.C.C. 777 and 93 M.C.C. 411 are hereby made a part hereof:

It is ordered, That the provisions of rule 1.101(e) of the General Rules of Practice be, and they are hereby, waived; that the petition of applicants-respondents, Central Freight Lines, Inc., of Waco, Tex., Inland Motor Freight Lines, Inc., of Corpus Christi, Tex., W. W. Callan and R. H. Linam, both also of Waco, and Blake Gillen, also of Corpus Christi, for extraordinary relief, for reconsideration, for continuance of temporary authority, and approval of the acquisition of control by Central Freight Lines, Inc.,

of Inland Motor Freight Lines, Inc., and replies thereto by Alamo Express, Inc., Southwestern Motor Transport, Inc., Brown Express, Inc., and Red Arrow Freight Lines, Inc., protestants, be, and they are hereby, accepted for filing; and that the proceedings be, and they are hereby, reopened for reconsideration on the present record.

It is further ordered, That, in No. MC-F-7682, the investigation proceeding be, and it is hereby, discontinued effective upon consummation of the transaction authorized in No. MC-F-7882.

It is further ordered, That, in No. MC-F-7882, the acquisition by Central Freight Lines, Inc., of control of Inland Motor Freight Lines, Inc., through purchase of its capital stock, and in turn, the acquisition by W. W. Callan, through the transaction of control of the latter, be, and the same are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That if the parties to the transaction authorized in No. MC-F-7882 desire to consummate same, they shall confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That the authority granted in No. MC-F-7882 shall not be exercised prior to the effective date hereof, and that this order shall be effective 35 days from the date of service thereof.

It is further ordered, That, if the authority granted in No. MC-F-7882 is exercised, Central Freight Lines, Inc., shall submit for consideration a sworn state-

ment, and one copy thereof, showing all expenditures made, by date, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That unless the authority granted in No. MC-F-7882 is exercised within 90 days from the effective date hereof, this order shall be of no further force or effect.

It is further ordered, That effective with consummation of the transaction authorized in No. MC-F-7882, or 90 days from the effective date hereof, whichever first occurs, the authority granted by order of September 5, 1961, as extended by order of February 16, 1962, authorizing the temporary control through management by Central Freight Lines, Inc., of Inland Motor Freight Lines, Inc., shall be of no further force or effect; and

It is further ordered, That recital in said reports of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed, or expenditures represented thereby.

By the Commission, Division 3, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary.

[SEAL]

ORDER

SERVICE DATE
OCTOBER 21, 1964

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 20th day of October, A. D. 1964.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Upon consideration of the record in the above-entitled proceedings, and

(1) of the petitions of protestants, Southwestern Motor Transport, Inc., embracing a request for oral argument; of Alamo Express, Inc.; and jointly of Red Arrow Freight Lines, Inc., and Brown Express, Inc., for reconsideration of the second report on reconsideration of Division 3, acting as an Appellate Division, decided June 29, 1964,

(2) of the reply of applicants-respondents, and

It appearing, That the order of June 29, 1964, reopening the proceedings was within the Commission's discretion; that the findings of fact and conclusions

of the said Division are supported by the evidence of record; and that no fact or substantial argument have been advanced by protestants which would warrant reconsideration or oral argument:

It is ordered, That the petitions be, and they are hereby, denied; and

It is further ordered, That the order of June 29, 1964, shall be effective 20 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary.

[SEAL]

APPENDIX B

APPLICABLE RULES FROM GENERAL RULES OF PRACTICE BEFORE THE INTERSTATE COMMERCE COMMISSION.

Rule 1.101(a)(3):

"(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(b) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsiderations of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited to those proceedings in which the entire Commission on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality."

Rule 1.101(e):

"(e) *Time for Filing.* Except for good cause shown, and upon leave granted petitions under this section must be filed within 30 days after the date of service of a decision or order."

Rule 1.101(f):

"(f) *Successive Petitions On Same Ground Not En-*

tertained. A successive petition under this section submitted by the same party or parties, and upon substantially the same ground as a former petition, which has been considered and denied by the entire Commission will not be entertained."

APPLICABLE SECTIONS OF THE UNITED STATES CODE, TITLES 5, 28, and 49.

Title 5 U.S.C. §1008(b):

"(b) LICENSES . . . In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no licenses with respect to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

28 U.S.C. §1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Title 28 U.S.C. §1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Title 28 U.S.C. §1398:

"Except as otherwise provided by law, any civil action to enforce, suspend, or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Title 28 U.S.C. §2101(b):

"(b) any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in a civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

Title 28 U.S.C. §2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties, and forefeitures, shall be as provided in this chapter. The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

Title 49 U.S.C. §5(2):

"(a) It shall be lawful, with the approval and authorization of the Commission as provided in subdi-

vision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for pub-

lic hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable; *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the pro-

posed transaction; and (4) the interest of the carrier employees affected.

"(d) * * *

"(e) No transaction which contemplated a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

* * *"

Title 49 U.S.C. §5(4):

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used

in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

Title 49 U.S.C. §5(6):

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

Title 49 U.S.C. §5(7):

"The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2)

to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person."

Title 49 U.S.C. §17(6):

"After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any parties thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish . . ."

Title 49 U.S.C. §17(9):

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to a matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set

aside orders of the Commission, but not otherwise."

Title 49 U.S.C. §306(a)(1):

"Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there be in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . . this paragraph shall not be so construed as to require any such carrier lawfully engaged in operations only within any State to obtain from the Commission a certificate authorizing the transportation of such carrier of . . . property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

Title 49 U.S.C. §306(a)(7)(B):

"All rights to engage in operations in interstate and foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this paragraph, shall cease and terminate, but any carrier lawfully engaged in interstate and foreign operations on the date of the enactment of this paragraph or any carrier who would have been so lawfully

engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, pursuant to such provisions, may continue such operations for 120 days after such date, and, if an appropriate application for a certificate of registration is filed within such period, such operations may be continued pending the determination of such application. The Commission shall prescribe the form of such application, the information and documents to be furnished, the manner of filing, and the persons to whom or the manner of giving notice to interested persons of such filing. Issues arising in the determination of such applications shall be determined in the most expeditious manner, and so far as practicable and legally permissible, without formal hearings or other proceedings. A notice of intent to engage in interstate and foreign operations accompanied by certified copies of effective, lawfully issued or acquired State certificates filed with the Commission as evidence of authority to operate in interstate or foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, has in effect immediately before the date of the enactment of this paragraph, shall be conclusive proof that the applicant is lawfully engaged in interstate and foreign operations and the scope thereof."

Title 49 U.S.C. §310a(b):

"Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more carriers,

or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."